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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.*,

Appellees.

BRIEF AND ARGUMENT OF ILLINOIS AND INDIANA AS AMICI CURIAE.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX.

PAGE

CASES AND STATUTES CITED.

Illinois Rev. Statutes, 1945, Ch. 122, Par. 29-7 2

Burns' Indiana Statutes, Ann. 1933, Sec. 28-595 2

Chance v. Mississippi State Board, 190 Miss. 453, 200 So. 706, 709 4

Cochrane v. Louisiana, 281 U. S. 370 3

Queenside Hills Realty Co. v. Saxl, 90 L. ed. 840, 327 U. S. 6

Pierce v. Society of Sisters, 268 U. S. 510 2

ARGUMENT

I. The New Jersey Statute Does Not Violate the Constitution of the United States 2

II. The Administrative Promulgation of the New Jersey Board was Valid 5

Conclusion 7

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ARGUMENT.

Illinois and Indiana join the appellees and other *amici curiae* in submitting that the judgment of the New Jersey Court of Errors and Appeals should be affirmed on the ground that the legislation in question is constitutional and that the administrative promulgation of the Ewing Board of Education, properly construed in the light of the facts shown by the record, is valid as against appellant's attack upon it.

Illinois and Indiana have statutes, cited in the margin *, that authorize the transportation of school children to both public and private schools, including parochial schools. These statutes enact the same public policy that finds utterance in the New Jersey statute, although the Illinois and Indiana statutes do not contemplate the direct reimbursement of parents for bus fares expended.

Invalidation by this court of the New Jersey statutes would gravely compromise the educational programs of Illinois and Indiana. Inasmuch as these policies are of long standing, presently unquestioned in these states and of undoubted public benefit, we have felt it appropriate to make this short presentation in this case.

I.

The New Jersey Statute Does Not Violate the Constitution of the United States.

This court is already committed to the following principles of constitutional doctrine, none of which appellant seeks to repudiate:

First: A state not only *may* recognize juvenile education at a parochial school that meets the state's secular standards as a substitute for similar education at a public school. It *must* do so in order to avoid unconstitutional violation of parents' and children's freedom of religion.

Pierce v. *Society of Sisters*, 268 U. S. 510.

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* Illinois Statutory Provision: (Illinois Rev. Statutes, 1945, Ch. 122, Par. 29-7.)
Indiana Statutory Provision: (Burns' Indiana Statutes, Ann., 1933, Sec. 28-595.)

Second: A state may furnish textbooks purchased and supplied at the state's expense to pupils in parochial and other private schools (provided, of course, that it also furnishes such textbooks to students enrolled in public schools).

Cochrane v. *Louisiana*, 281 U. S. 370.

It is unquestioned that a state may make it a crime on the part of parents not to send their children to school, and may punish a child for truancy. Therefore this court could not reverse the judgment under review without declaring that a state may not help a child to do what it compels him to do, namely, attend either a public or an approved private school, secular or parochial, as his parents may choose.

We think that the considerations briefly noted above put the instant question in its true posture. When it is conceived in that posture, it will be seen that this case does not present any question of authoritarian establishment or aid of religion at public expense; for the right of children to attend parochial schools and the right of the state to aid them to do so by tax exemption and free textbooks is already established by this court's decisions and is an important fact in the nation's history.

At least fifteen other states have enacted legislation making provision at public expense in one way or another for the transportation of children to both public and private, including parochial, schools. (See Appellees' Brief for a compilation of these laws.)

The passage of bills by fifteen states or even by forty-eight states cannot make constitutional that which is plainly obnoxious to the organic law of the land. But if the question is doubtful, the concurrence of many state

legislatures, all of whose members are sworn to obey the federal constitution in enacting similar legislation, is an eloquent practical construction of the federal constitution by those whom it entrusts with legislative powers. Such a construction is, we submit, entitled to the greatest respect by this court. This consideration is the real justification for the presumption in favor of the constitutionality of the act of even a single state legislature.

We do not further protract this short brief because the brief for respondents ably and fully develops the considerations that in our earnest view require an affirmance of the New Jersey court's judgment.

We briefly note and emphasize, however, that, as shown in appellees' brief, tax exemption of parochial schools is a grant far more direct, far more important to the school, and far more costly to the public than is mere transportation without the payment of a cent to the school by the pupils who attend it. Yet the constitutionality of such exemption is unquestioned because private schools, including parochial schools, discharge at their own expense a great responsibility of the state that would otherwise have to be paid for by public funds.

"If the pupil may fulfill its duty to the state by attending a parochial school," said the Supreme Court of Mississippi in *Chance* v. *Mississippi State Board*, 190 Miss. 453, 200 So. 706, 709, "it is difficult to see why a state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed but not its need."

II.

The Administrative Promulgation of the New Jersey Board Was Valid.

The New Jersey Board's administrative provision for the transportation of pupils to public and parochial schools was assailed below because it provides for transportation to the particularly named schools of a single denomination named in the resolution and does not explicitly contemplate provision for transportation to schools of other denominations. We of course concede that if a state furnishes free transportation to schools of any religious sect, it must provide such transportation to all sectarian schools that meet the state's requirements for secular education of children of the same age group. We concede, too, that the New Jersey Board's regulation would be unconstitutional if in fact there were schools of other denominations, or even another accredited school of the same denomination, within the Board's territory and otherwise *in similare statu* to the school named in the regulation unless the pupils of such school were afforded the "equal protection" of free transportation.

But the facts shown by the record are that there was no other private school, either denominational or non-sectarian, within the Board's district and jurisdiction. Such a generic phrase as "all accredited elementary private schools conducted not for profit," if it had been inserted in the promulgation instead of the names of the schools in question would have meant only the present schools for there were no others in the district.

We have no doubt that if another private school qualifies for accreditation, the text of the regulation in question

will be revised to include it, either in generic terms or by specific designation. Should the New Jersey Board insist on preferring one accredited private school over another on any grounds other than those of adequacy or inadequacy of the institutions by secular educational standards, any court in the United States would strike such action down.

But unconstitutional discrimination does not exist unless the facts, regardless of the diction of the statute or other regulatory measure, give rise in such discrimination.

This court's recent decision in *Queenside Hills Realty Co.* v. *Saxl*, 90 L. ed. 840, 327 U. S. ..., is conclusive. In that case, the text of the law was such as to give rise to the charge that it unconstitutionally discriminated in favor of rooming houses that should be built after it was passed and against rooming houses that were in existence at the time of the bill's enactment. This court refused to consider the question because it did not appear from the record that in fact any building of the type contemplated by the law had been built since its passage. The court indicated that, should such buildings be erected and should discrimination occur in the future, the question as to whether the discrimination was reasonable would then be considered. Similarly, in the instant case, should invidious discriminations grounded upon sectarian preferment or other unconstitutional bases of classification occur in the future, it will be time enough for this court or some lower court to interfere.

Conclusion.

For the reasons suggested in this brief and argued in the briefs of appellees, as well as those of other *amici curiae*, Illinois and Indiana respectfully submit that the judgment under advisement should be affirmed.

Respectfully submitted,

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